cf 172/06

Single Bench

IN THE HIGH COURT OF JUDICATURE AT CHHATTISGARH

SECOND APPEAL NO. 68 OF 2006

APPELLANT:
(Defendant No.2)

V.K. Munshi, son of Shri K.P. Munshi, by profession Advocate, aged about 60 years, resident of Purohitbada, Budhapara, Raipur.

P.R. No. 376/06 Presented by Shri B.P. Sharma dated 10/8/06

Vs

RESPONDENTS:
(Plaintiff)

1. Kuberchand Deshlehra, son of Shri Bhurchand Deshlehra, resident of Raipur Co-operative Housing Society, Choubey Colony, Raipur.

Defendant No.1

2. Raipur Co-operative Housing Society, a society duly registered under the relevant provisions of C.G. Co-operative Societies Act, having registration No.1554, Choubey Colony, Rajendra Nagar, Raipur.

Civil Suit & First Appeal was valued at Rs.1,000/-,
Court fee affixed was Rs.170/-
This appeal is also valued at Rs.1,000/-Court fee affixed is Rs.172/-

APPEAL UNDER SECTION 100 OF CODE OF CIVIL PROCEDURE, 1908

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HIGH COURT OF CHHATTISGARH AT BILASPUR

SECOND APPEAL NO. 68 of 2006

Appellant (defendant No.2) : V.K. Munshi

Vs.

Respondents/plaintiff : 1. Kuberchand Deshlehra

(Defendant No.1) 2. Raipur Co-operative Housing Society.

ORDER

POST FOR ORDER ON 11-05-2006

Sd/-
Dhirendra Mishra
Judge

HIGH COURT OF CHHATTISGARH AT BILASPUR

SECOND APPEAL NO. 68 OF 2006

Appellant (defendant No.2)	:	V.K. Munshi	
Vs.			
Respondents/plaintiff	:	1.	Kuberchand Deshlehra
(Defendant No.1)		2.	Raipur Co-operative Housing Society.

Present : Shri B.P.Sharma, learned counsel for the appellant/defendant No.2.
Shri N.K.Vyas, learned counsel for the respondents.

ORDER
(Passed on || .05.2006)

Dhirendra Mishra, J.

Heard on admission.

2. The appellant has preferred this second appeal under Section 100 of the Code of Civil Procedure against the impugned judgment and decree dated 08.12.2005 passed in Civil Appeal No.3-A/2005 by learned First Additional District Judge, Raipur and by which the learned Additional District Judge has confirmed the judgment and decree dated 8.12.2004 passed by First Civil Judge Class-I, Raipur in Civil Suit No.53-A/2004 and dismissed the appeal preferred by the appellant. (The parties hereinafter shall be referred to as per their description before the trial Court).

3. The plaintiff filed a civil suit against Raipur Co-operative Housing Society on 22.8.1987 for declaration, perpetual injunction and damages averring that it is a society registered under the Co-operative Societies Act

(for brevity "the Act") and he is the senior member of the society having membership No.309. The plaintiff was allotted plot No.38 (hereinafter referred to "suit plot") by the society on 10.2.1971, however, information about the allotment was given to the plaintiff for the first time only on 25.7.1977, when the possession of the suit plot was given on that date. A registered sale-deed of the suit plot was executed on 16.9.1981 in favour of the plaintiff by the defendant/society, however, the plaintiff requested for a bigger size of plot and the then officers of the defendant/society assured him that his demand shall be considered. Thereafter, in the year 1983, one Rambabu Shrivastava was allotted a bigger size of plot by the defendant/society, who wanted to exchange his plot with a smaller size of plot and the plaintiff accepted the proposal of the defendant/society in this regard, and since the proceeding of exchange of plot between Rambabu Shrivastava and the plaintiff was pending, the plaintiff could not undertake construction over his plot. The plaintiff was ready to construct house on the allotted plot and he has already constructed compound wall and is in possession of the suit plot continuously without any interruption since 16.09.1981. He had filed an election petition against the office bearers of the defendant/society on 14.07.1987 and because of this, a show-cause notice dated 04.08.1987 was issued by the defendant/society, calling upon him, as to why his allotment should not be cancelled. By this notice, the plaintiff was also informed that the value of the plot is being sent as per directions of the department, and from the above notice, the plaintiff learnt that the notice was issued as per directions of the Deputy Registrar, Co-operative Societies, Raipur. It was alleged that it was not within the jurisdiction of the society to cancel the sale of the suit plot and the same is in contravention of the Rules and By-laws of the society, and in the aforesaid circumstances, it was prayed that the plaintiff be permitted to institute a suit before expiry of the statutory period under Section 94 of the Act. Learned trial Court, vide order dated 25.08.1987, directed the defendant to maintain the status quo with respect to the suit property.

4. A written statement was filed by the defendant/society on 29.08.1992 and it was stated for the first time that the suit property was transferred to the

appellant, whereupon the plaintiff moved an application for amendment, which was allowed vide order dated 19.09.1994, and the appellant was added as defendant No.2. Defendant No. 2 contested the civil suit and raised various objections regarding maintainability of the suit.

5. On the basis of the pleadings of the respective parties, issues were framed, and the learned Civil Judge, while deciding issue No.5 as preliminary issue, vide order dated 14.10.1996, returned the plaint for being presented to the appropriate Court on the ground that the Civil Court has no jurisdiction to decide the disputes between the co-operative society and its members.

6. The plaintiff preferred miscellaneous appeal, which was registered as Miscellaneous Civil Appeal No.41/1998, and the learned IIIrd Additional District Judge, vide order dated 07.04.1999, allowed the appeal and remanded the matter with a direction to the trial Court to decide the suit in accordance with law. Defendant No. 2, the appellant herein, preferred a writ petition bearing No.3239/1999 before the High Court of M.P., however, the same was dismissed as withdrawn with liberty to file civil revision, vide order dated 08.12.1999. Thereafter, defendant No. 2 preferred civil revision No.500/2000, which was also dismissed by the High Court vide order dated 13.09.2000 affirming the order passed by learned Additional District Judge. The review application preferred by defendant No. 2 was again rejected vide order dated 10.02.2003 by the High Court.

7. Thereafter, learned Civil Judge recorded statements of the witnesses. Defendant No.1, the society, examined Sandeep Agrawal as a witness, however, his evidence could not be completed as he did not present himself for cross-examination despite several opportunities and ultimately the learned Civil Judge closed the opportunity of adducing evidence of defendant No.1, the society. The order of closing evidence of the defendant/society was also challenged by way of Writ Petition No.3003/2003 and ultimately the suit was decreed in favour of the plaintiff and the appeal preferred by defendant No.2 has been dismissed by the impugned judgment.

8. Learned counsel for the appellant argued that on the basis of the pleadings and the documentary and oral evidence available on record, the following substantial questions of law arise for adjudication of this appeal :-

(i) "Whether after confirmation of the cancellation of the allotment of the suit plot made by the Deputy Registrar, Co-operative Societies, as per law remedy of the plaintiff lies under the Co-operative Societies Act and not under the general law, as the Act is a self-contained code?

(ii) Whether the Courts below were justified in decreeing the suit of the plaintiff as the suit plot has been validly allotted by defendant No.1/society in favour of defendant No.2 and the plaintiff has not sought any relief against defendant No.2 in this regard in terms of cancellation of sale-deed executed in favour of defendant No.2 and whether the suit filed in the present form was maintainable?"

(iii) Whether the suit of the plaintiff was premature since the same was filed even before expiry of period of notice prescribed under Section 94 of the Act and the plaint is liable for rejection at the threshold?

(iv) Whether the By-Laws of the society are binding on its members and their violation gives the society a right to cancel the plot?"

9. Shri B.P.Sharma, learned counsel for the appellant arguing on M.C.P. No. 224/06, an application for grant of ad-interim relief, submitted that in the facts and circumstances of the case, the operation of the impugned judgment and decree deserves to be stayed.

10. On the other hand, learned counsel for the respondents, Shri N.K. Vyas, Advocate, referring to the objections and documents annexed thereto, submitted that no substantial question of law, as proposed above by the appellant, is involved for adjudication of this second appeal. The plaintiff is in

possession of the suit plot since the execution of the sale-deed in his favour. The order of the status quo was operative in favour of the plaintiff since 25.08.1987 and the defendant No. 2 has not claimed any relief before both the Courts below and, therefore, he is not entitled for any interim relief at the second appellate stage.

11. I have heard learned counsel for the parties.

12. On the basis of the pleadings of the respective parties, learned Civil Judge decreed the suit of the plaintiff by recording a finding inter alia that (i) by virtue of registered sale-deed, executed by the co-operative society, the plaintiff is the owner and title-holder of the suit plot, (ii) the notice dated 4-8-1987 issued by defendant No.1 to the plaintiff is illegal and inoperative being without jurisdiction, and the office bearers of the defendant/society should be permanently restrained from acting in accordance with the letter dated 4-8-1987, (iii) the plaintiff is entitled for a perpetual injunction to the effect that the defendants or any other person shall not interfere with the ownership and possession of the plaintiff over the suit plot, (iv) the plaintiff is also entitled for a decree of Rs.1,000/- by way of compensation, and (v) the instant suit was not barred as per Section 82 read with Section 64 of the Act, and accordingly the suit was decreed with costs.

13. So far as the first proposed substantial question of law is concerned, the civil revision preferred by defendant No.2 on this ground has been rejected by the High Court of Madhya Pradesh and order passed by the learned Additional District Judge with regard to issue No.5, framed by the trial Court in favour of the plaintiff has been affirmed, and since the order has attained finality, no substantial question of law, as proposed above by the appellant, is made out.

14. So far as the submission of the counsel for the appellant with respect to the proposed substantial question of law No.2 is concerned, the plaintiff had challenged the notice dated 4-8-1987 by which the defendant/society, as per directions of the Deputy Registrar, Co-operative Societies, had cancelled

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the allotment of the suit plot in favour of the plaintiff on the ground that the cancellation was done without affording any opportunity of hearing in contravention of natural justice. However, both the Courts below had recorded a finding of fact that after allotment of the suit plot, the plaintiff and Rambabu Shrivastava had applied for exchange of their plot and the then President of the Managing Committee had accorded permission and directed to deposit the difference amount which was duly deposited, but during pendency of the exchange-proceedings, the allotment was cancelled without notice. Therefore, in the aforesaid circumstances, order dated 4-8-1987 has been held to be illegal and inoperative, being without jurisdiction. Once the order of cancellation of allotment and sale-deed is held to be illegal, then the order becomes nonest and any subsequent action on the part of defendant No.1 in terms of re-allotting the suit plot in favour of defendant No.2 confers no title to the subsequent allottee as there was no plot available for allotment to the defendant/society and the plaintiff is not required to seek any such relief against defendant No.2 in terms of cancellation of sale-deed in his favour by defendant No.1, and no substantial question of law in this regard, as proposed by the appellant, is made out.

15. So far as the third proposed substantial question of law is concerned, though the appellant has raised this issue in the civil revision, preferred by him before the High Court, and the same was rejected by the High Court, however, learned counsel for the appellant submits that this issue was not dealt with by the High Court while dismissing the revision preferred by the appellant and this being a legal issue, can be raised by the appellant as a substantial question of law for adjudication of this appeal. Learned counsel for the appellant places reliance on the order of this Court passed in Writ Petition No.1993/2005 in the matter of **Smt.Kumari Bai and another vs. State of Chhattisgarh and another**, and submits that where the statutes provides for statutory notice under special enactment as in the instant case under Section 94 of the Act, then the Civil Court could not have taken cognizance before the expiry of the period prescribed under the Act. However, the argument advanced by counsel for the appellant in this regard is also not acceptable, as firstly, in the instant case, before filing the

proposed suit, a notice was sent to the defendants and the suit was filed with a prayer for permission to file the instant suit before expiry of the statutory period prescribed under Section 94 of the Act. The plaintiff had also moved an application for temporary injunction and ad-interim temporary injunction along with the suit. In Smt.Kumari Bai's case (supra), the High Court, relying upon the judgment of a Division Bench of Madhya Pradesh High Court in the matter of **Ram Krishna Parashar vs. Chironji Lal Vaishya and others, reported in 1977 JLJ 184**, has held in para 23 as under :-

Para 23 : "xxxxx xxxxx xxxxx an intending plaintiff has a remedy to institute a claim by issuing a notice and filing an application seeking temporary injunction and making a prayer to the Court to exercise inherent power under Section 151 enclosing a copy of an intended plaint to be registered as a suit upon expiry of statutory period of notice and in that event the civil Court acting on such an application, in appropriate cases, can grant temporary injunction in exercise of its inherent power saved by Section 151 of the CPC."

16. In view of the above, this Court is of the considered opinion that in the instant suit substantive compliance of Section 94 of the Act has been done by the plaintiff and as such no substantial question of law is made out for adjudication of this appeal.

17. So far as the fourth, i.e., last proposed substantial question of law is concerned, both the Courts below, on the basis of the documents and oral evidence available on record, have recorded a finding that as per the standard By-Laws of the society, there is no provision that after allotment of the land the allottee has to undertake construction within three years, failing which, the allotment can be cancelled and re-allotted to another member. The above finding is also a finding of fact which is based on oral and documentary evidence available on record.

18. On the basis of the aforesaid discussion, this Court is of the considered opinion that no substantial question of law, as proposed above by

the appellant, is made out for adjudication of this appeal. The appeal, being devoid of merit, deserves to be dismissed at the motion stage itself, and is accordingly dismissed. In the light of above order, M.(C.)P.No.224/2006, an application for grant of ad-interim relief, also stands dismissed. There shall be no order as to costs.

Sd/-
Dhirendra Mishra
Judge

Khan